

IN THE SUPREME COURT OF THE STATE OF MONTANA

OP 10-0294

FILED

AUG 17 2010

Ed Smith
CLERK OF THE SUPREME COURT
O R D E R STATE OF MONTANA

LLOYD S. MAIER,

Petitioner,

v.

THIRD JUDICIAL DISTRICT COURT, and
THE BOARD OF PARDONS AND PAROLE,

Respondents.

We have recaptioned this matter to include the Board of Pardons and Parole as a respondent. Lloyd S. Maier (Maier) filed a document captioned "Writ of Mandamus" with this Court. Therein, he also requests that we exercise "advisory control" over the Third Judicial District Court, Powell County. A document Maier attempted to file with the Clerk of the Powell County District Court (Clerk) is captioned "leave to file." The Clerk responded to Maier's March 20, 2010 letter that the office had not received the document, but based upon the caption, "leave to file" the office would have returned it to him because leave is not required to initiate a civil action. On April 16, 2010, stating the originals must be signed in blue ink so that they are identifiable as originals, the Clerk returned documents Maier attempted to file as improper for commencement of an action. The letter also instructed Maier to follow the Montana Rules of Civil Procedure and suggested that he contact an attorney or check with the Montana Law Library for advice in filing documents.

The underlying issue raised in the document captioned "leave to file" consists of the Board's refusal to provide Maier a copy of a psychological report conducted upon him by Dr. Mark Mozer in 2005 in support for an application for executive clemency. The Board then refused to recommend executive clemency. Maier wishes to again apply for clemency. Maier states that Board staff demand that he submit to a second

psychological evaluation by Dr. Mozer, when he was never allowed access to the previous evaluation.

Citing § 2-6-102, MCA, and Article II, Section 24 of the Montana Constitution, Maier insists that he is entitled to access to the evaluation report. Maier states that § 46-23-301, MCA, does not require him to seek a psychological report as a requirement of applying for executive clemency. Maier accuses Board staff of official misconduct, tampering with public records and corrupt influence.

We ordered the Board and the Clerk to file responses to the purported petition. The Clerk filed an affidavit in response to our June 29 Order, and the Board filed a Response to Petition for Writ of Mandamus. As required in our Order, the Board included a copy of the psychological report in question under seal.

The Clerk acknowledges in her affidavit that the office returned to Maier a document captioned “leave to file.” She states that the phrase “leave to file” is applicable only to criminal matters under § 7-4-2712, MCA. The Clerk also states that it is difficult, and sometimes impossible, to determine if a signature in black ink is an original or a copy. Therefore, the Clerk requests that all parties sign original documents they wish to file with the Clerk in blue pen. The Clerk also defends her action in returning the document to Maier because M. R. Civ. P. 3 states that a civil action “is commenced by filing a complaint with the court.”

In the response, the Board states that Maier was found guilty in a jury trial of two counts of Attempted Deliberate Homicide and two counts of Use of a Weapon [sic] in Cascade County District Court. Maier fired an assault weapon at a vehicle with two occupants and hit the vehicle at least eight times, injuring both occupants. Maier was on parole for Criminal Endangerment at the time that he committed the new crimes. In June 1996, Maier was sentenced to 80 years, with no parole eligibility for 32 years. The Board states that Maier will not be parole eligible until 2030.

The Board acknowledges that Maier applied for executive clemency in 2005 and that the Board required an evaluation from psychologist Mark Mozer. The Board determined that there was insufficient cause for a public hearing, and that the application

was “totally without merit and is denied.” Exhibit “B” to Affidavit of Major Thomas Wood. The Board stated as reasons to deny the application: “The nature and severity of the offenses, previous criminal history, poor history under supervision, horrendous misconduct record at Montana State Prison and the fact that [he is] not fully compliant with treatment.” Exhibit “B.”

Major Thomas Wood (Wood), the Security Major at Montana State Prison, stated in his affidavit that he considers Maier to be a dangerous inmate who has a long history of disciplinary infractions, including threats to kill staff, other threats to staff, inciting others to riot, and assaults on staff. Given Maier’s propensity for violence both in and out of prison, Wood fears for Dr. Mozer’s safety if Dr. Mozer’s unfavorable psychological report is made available to Maier. Based upon the penological interest in the safety of Dr. Mozer, Wood is concerned that Maier may be motivated to violently retaliate against Dr. Mozer if the unfavorable report is disclosed to Maier. Wood is also concerned for the safety of other staff should Maier attempt to retaliate.

On behalf of the prison, Executive Director of the Board Craig Thomas asserts the prison’s penological interests mandate that Dr. Mozer’s report remains confidential. Thomas also explains that it is impossible to redact portions of the report as Maier already knows that Dr. Mozer prepared the report.

The Board cites *Worden v. Montana Bd. of Pardons & Parole*, 1998 MT 168, 289 Mont. 459, 962 P.2d 1157, and *Great Falls Tribune v. Judicial D. Court*, 238 Mont. 310, 318, 777 P.2d 345, 350 (1989) in support of its position. The Board contends that the risk to Dr. Mozer’s safety outweighs Maier’s right to know the contents of the psychological evaluation.

Our concern here is Maier’s access to the courts and legal process to file for executive clemency. The Clerk is either misinformed or oversimplifies that all civil actions must be commenced by complaint. Original petitions may also be classified as civil causes when filed with the district courts. While Maier incorrectly captioned his purported petition, the “leave to file” document is not incomprehensible. The Board has been able to understand the request and respond with clarity. A better practice than

refusing to file the document solely based on its caption would have been to file the document as an original petition, or consult with the District Court to determine if the document should be filed.

With respect to the requirement that all documents to be filed with the Powell County District Court must be signed in blue ink, we understand that at times it is difficult to distinguish a copy from an original signed in black ink. However, the Clerk of this Court files documents from self-represented litigants that are entirely written in pencil or black ink. Inmates face many barriers to accessing the courts. Requiring a signature in blue ink constitutes another barrier. We disapprove of this practice.

While Maier challenged the Board's authority to require a psychological evaluation in the executive clemency process, we note that § 46-23-301(2)(b), MCA, authorizes the Board to investigate "[T]he individual circumstances relating to social conditions of the applicant prior to commission of the crime, at the time of the offense was committed, and at the time of the application for clemency." This language is broad enough to allow the Board to require Maier to submit to a psychological evaluation as part of the process. Nevertheless, Maier has a list of disciplinary infractions several pages long, and has served only a fraction of his sentence. It is highly unlikely Maier can establish a sufficient basis for executive clemency at this time.

Major Wood has clearly characterized the report as unfavorable to Maier. The Board has vigorously argued that the report must not be disclosed to Maier based upon safety and security concerns. Having reviewed the evaluation under seal, we are uncertain whether the institutional and individual safety and security concerns cited by the Board are in any way intensified if Maier was given access to the report, as opposed to denying him the report. Maier already knows the report is unfavorable. Whether he would be more inclined to retaliate against Dr. Mozer if provided a copy of the report has not been established.

Moreover, Maier's request for the psychological report does not consist of a ministerial duty under mandamus. A balancing of conflicting constitutional interests constitutes a discretionary duty not cognizable under mandamus.

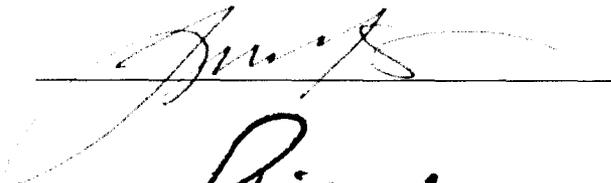
Maier has not established that another court is proceeding under a mistake of law that is causing him a gross injustice such that it would support granting him supervisory control. M. R. App. P. 14(3)(a). He was able to access this Court, we ordered responses, and we have considered the issues raised in a thoughtful manner. Therefore,

IT IS ORDERED the petition for a writ of mandamus, or alternatively, supervisory control is DENIED.

The Clerk is directed to provide a copy of this Order to counsel of record, to the Third Judicial District Court, Powell County, and to Maier.

DATED this 17th day of August, 2010.

Chief Justice



Patricia Cotter

John D. ...

Justice